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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 161.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT AND OTHERS, *Appellants,*

vs.

BARNWELL BROTHERS, INC., AND OTHERS, *Appellees.*

MOTION OF COMMONWEALTH OF KENTUCKY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

M. B. HOLIFIELD,
Assistant Attorney General of Kentucky.

HUBERT MEREDITH,
Attorney General of Kentucky, Of Counsel.

November 10, 1937.

WESTERFIELD-BOMTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

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MOTION OF COMMONWEALTH OF KENTUCKY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

THE COMMONWEALTH OF KENTUCKY, by the undersigned, its Assistant Attorney General, respectfully moves this Honorable Court for leave to file in this case the accompanying brief as *amicus curiae*. The ground of this motion (which is set out more fully in the brief, *infra*, pp. 3-6) is that a suit is now pending in the Federal Court for the Eastern District of Kentucky, brought by the trucking interests, to perpetually enjoin the enforcement of the Kentucky statute fixing weight and size limitations of trucks. That suit is similar to this one and involves substantially all the questions of law which are to be decided herein.

In view of the great importance of the questions involved, which in fact materially affect the interest of all the states, petitioner respectfully moves the Court for leave to participate by counsel in the oral argument, provided the Court can make an allotment of time in addition to that regularly allotted to counsel for appellants.

M. B. HOLIFIELD,
Assistant Attorney General of Kentucky,

HUBERT MEREDITH,
Attorney General of Kentucky,
Of Counsel.

SUBJECT INDEX TO BRIEF.

PAGE

I. PRELIMINARY STATEMENT 3– 7

II. SUMMARY OF ARGUMENT 8–12

III. ARGUMENT 13–67

POINT A.

Notwithstanding the Trial Court's Findings of Fact, the Validity of the Act Should Have Been Sustained 13–40

1. Since the Lower Court Held the Act Valid Under the 14th Amendment and Since Discrimination, the Only Additional Feature Pertinent to the Commerce Clause Was Not Shown, the Court's Opinion Shows that the Act Should have been Sustained 15–19

2. Since the Lower Court Held that the Act Did Not Impose an Unreasonable Burden on Interstate Commerce in Its Application to 96% of the Highways, It was Error to Hold It Invalid in Its Application to the Remainder 19–25

3. In View of the Existence Within the 2400 Miles Involved of Bridges, Sections of Highway and City Streets Which are Inadequate to Sustain the Larger and Heavier Trucks, the Court Should Not Have Substituted Its Judgment for that of the Legislature in Determining Whether the Law Should Apply to the Entire System 25–27

4. Assuming the Findings of Fact, However One-sided, to be Correct, Nevertheless the Provisions of the Act are Within the Limits of Legislative Discretion 28–33

5. The Facts of Common Knowledge and Within the Court's Judicial Cognizance and the Pertinent Declarations and Decisions of this Court Establish the Validity of the Act Here in Question 33–40

POINT B.

PAGE

It Appears from the Opinion of the Lower Court that the Federal Highway Act and the Federal Motor Carrier Act of 1935 Were Erroneously Assumed to Restrict the Power of the States to Impose Uniform Limitations Upon the Size and Weight of Motor Vehicles Engaged in the Commercial Transportation of Interstate Commerce on Federal-aid Highways 40–67

1. Neither the Federal Highway Act Nor the Fact that the Federal Government has Aided in the Construction of State Highways Restricts or Affects the Power of the State to Enact and Enforce the Legislation Here in Controversy . 43–61

2. By the Enactment of the Motor Carrier Act of 1935 Congress Did Not so Occupy the Field as to Prevent, Restrict, or in any Wise Affect the Exercise of the Power of the State to Enact and Enforce the Statute Regulating the Size and Weight of Motor Trucks 61–67

TABLE OF CASES.

PAGE

Aero Mayflower T. Co. v. Georgia Pub. Serv. Com., 295 U. S. 285 33

Ashland Transfer Co. v. State Highway Comm., 247 Ky. 144, 56 S. W. (2d) 691 6

Barnwell Bros. v. South Carolina State Highway Dept., 17 F. Supp. 803 .....3, 15, 25, 41, 51, 54, 61, 62

Bradley v. Pub. Util. Comm'n, 289 U. S. 92 .....36, 48, 53

Buck v. Kuykendall, 267 U. S. 307 .....12, 46, 48

Bush & Sons v. Maloy, 267 U. S. 317 .....12, 46, 47, 48

Carey v. South Dakota, 250 U. S. 118 66

Carley & Hamilton v. Snook, 281 U. S. 66 37

Continental Baking Co. v. Woodring, 286 U. S. 352 ... 16, 23, 32, 38

Daniel v. John P. Nutt Co., 180 S. C. 19, 185 S. E. 25; cert. den. 297 U. S. 724 33

Erie Railroad Co. v. Board of Public Utility Comrs., 254 U. S. 394 65

Euclid v. Ambler Realty Co., 272 U. S. 365 23

Geo. Van Camp & Sons Co. v. American Can Co., 278 U. S. 245 58

Gilman v. Philadelphia, 3 Wall. 713 39

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465 66

Hartford Accident & Indemnity Co. v. Illinois, 289 U. S. 155 66

Hendrick v. Maryland, 235 U. S. 610 37

Hicklin v. Coney, 290 U. S. 169 37

Houston & North Texas Freight Lines v. Phares, 19 F. Supp. 420 62

Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612 .....45, 64

Missouri Pacific R. Co. v. Norwood, 283 U. S. 249 63

Morris v. Duby, 274 U. S. 135 .....12, 16, 35, 36, 45, 48, 49, 50, 52, 53, 59

Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405 ...12, 46, 50, 54, 58, 60

Nashville, etc. R. Co. v. White, 278 U. S. 456 23

PAGE

N. W. Bell Tel. Co. v. Nebraska S. R. Comm., 297 U. S. 471 66
New York v. Hesterberg, 211 U. S. 31 23
New York, N. H. & H. R. Co. v. New York, 165 U. S. 628 45
Penna R. R. Co. v. Hughes, 191 U. S. 477 66
Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192 23
Reid v. Colorado, 187 U. S. 137 45
Savage v. Jones, 225 U. S. 501 45
Southern Ry. Co. v. King, 217 U. S. 524 66
Sproles v. Binford, 286 U. S. 374 ..... 14, 16, 19, 23, 24, 28, 31, 32, 35, 52, 59
St. Louis & Iron Mtn. Ry. v. Arkansas, 240 U. S. 518. 23
Sprout v. South Bend, 277 U. S. 163 37
Stephenson v. Binford, 287 U. S. 251 ..... 39, 48
Townsend v. Yoemans, 301 U. S. 441 ..... 44, 59, 66
United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 58
Vandalia R. R. Co. v. Public Serv. Comm., 242 U. S. 255 66
Werner Transp. Co. v. Hughes, 19 F. Supp. 425 62
Werner Transp. Co. v. O'Brien, District Court of the United States, Sou. Dist. of Iowa, Central Division, February, 1937 62
Whitney v. Fife, Court of Appeals of Kentucky, October 29, 1937 (Not yet officially reported) 7

STATUTES CITED.

Act No. 259, General Assembly South Carolina, Apr. 28, 1933, 38 Stats. 340 ..... 3, 15, 30
Federal Aid Act, Act July 11, 1916, c. 241 43
Federal Highway Act, U. S. Code Anno., Title 23, Sec. 1, *et seq.* 11, 13, 16, 17, 41, 43, 59, 60
Motor Carrier Act, 1935, U. S. Code, Anno., Supp. I, Title 49, Ch. 8 ..... 11, 12, 13, 16, 41, 61

CONGRESSIONAL DOCUMENTS.

Report of Joint Committee on Federal Aid, House Document No. 99, 63d Congress, 3d Session 58

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BARNWELL BROTHERS, INC., ET AL., *Appellees*.

BRIEF FOR COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

The opinion of the court below is officially reported in *Barnwell Bros., Inc., et al.*, v. *South Carolina State Highway Department, et al.*, 17 F. Supp. 803.

The bill of complaint was filed by certain common and contract carriers by motor trucks engaged in interstate commerce and by certain shippers by interstate motor vehicles attacking the validity of a statute of the state of South Carolina limiting the gross weight of trucks and tractor-semi-trailers to 20,000 pounds

and the width to 90 inches. The District Court of the United States for the Eastern District of South Carolina held that these restrictions imposed an unreasonable burden, when applied to commercial trucks operating in interstate commerce upon certain designated highways and other "standard concrete highways," and hence were void as applied to such trucks upon such highways, aggregating approximately 2,400 miles.

On the 2d day of August, 1937, a bill of complaint was filed in the United States District Court for the Eastern District of Kentucky by certain common and contract carriers by motor trucks engaged in interstate commerce and by certain shippers by interstate motor vehicles attacking the validity of Sections 3, 4 and 6 of Chapter 106, Acts of the General Assembly of Kentucky, 1932, which impose the following limitations upon motor trucks and semi-trailer trucks: Gross weight, 18,000 pounds; height, 11½ feet; length, 26½ feet for trucks and 30 feet for semi-trailer trucks. The style of that case which, for the sake of convenience, will hereinafter be called the "Kentucky case," is *Adams Packing Company, et al.*, v. *G. Lee McLain, et al.*, in Equity No. 1266.

The bill of complaint, including parties, allegations and prayer, is modeled closely after the bill of complaint and the opinion of the lower court in the instant case, which will be referred to herein as the "South Carolina case."

The main prayer of the bill in the Kentucky case is as follows:

"That it be adjudged and decreed that Sections 3, 4 and 6 of Chapter 106, Acts of the General Assembly of Kentucky, 1932, are *in violation of Section 8, Article 1 of the Constitution of the United States in that* (1) they are a burden upon the free flow of interstate commerce, (2) they defeat the purposes of Federal-aid, (3) they defeat and subvert the administration and purposes of the Motor Carrier Act, and (4) they have been superseded by the Motor Carrier Act and are null and void as applied to common, contract and private carriers for hire in interstate commerce."

It is further prayed that the defendants, who are the chairman of the Kentucky Department of Highways and other officials whose duties it is to enforce the Kentucky Act, be restrained from enforcing the law on certain designated Federal-aid highways described in the bill which, according to the mileage therein stated, aggregate 1,955 miles, "or on such other highways within the boundaries of the State of Kentucky as to which, from the evidence to be taken in this cause, the said provisions of the Kentucky Act may appear to be invalid on the grounds above set forth."

Counsel for the plaintiffs in the South Carolina case are Messrs. S. King Funkhouser, J. Ninian Beall, Frank Coleman and L. Mendel Rivers. In the Kentucky case counsel for the plaintiffs are Messrs. S. King Funkhouser, J. Ninian Beall and Frank Coleman.

Answer has been filed by the defendants in the Kentucky case, and the case has been set for trial on December 6, 1937, at Lexington, Ky.

The facts in the Kentucky case will, of course, necessarily be different from those stated in the findings of fact in the South Carolina case, so we shall not attempt to discuss the evidence in the latter case or the relation of the findings of fact to the evidence. Besides, it is appropriate that the presentation of the facts be made by those who are more familiar with them than are we. In the light, however, of the applicable law, as hereinafter presented, we submit that the evidence introduced by appellants amply supports the validity of the statute.

We shall confine ourselves to a narrower issue, but one of more general importance—that it appears from the opinion of the court in the South Carolina case that the findings of fact, conclusions of law and decree were predicated upon *fundamental errors of law.* Since substantially the same principles of law must also be applied to the facts in the Kentucky case, it is obvious that we are directly interested in having those errors corrected upon this appeal.

It is a matter of vital importance to Kentucky to sustain the validity of its statute because, if it is overturned, the highways of the state will be damaged to the extent of many millions of dollars, the annual maintenance cost will be greatly raised, and the danger and inconvenience to the traveling public will be increased. We may add that the validity of the Kentucky Act in all of its aspects was fully sustained in a carefully considered opinion by the Court of Appeals of Kentucky in *Ashland Transfer Co.* v. *State Highway Commission,* 247 Ky. 144, 56 S. W. (2d) 691. This

opinion was reconsidered and reaffirmed by the Court of Appeals in *Whitney* v. *Fife,* delivered October 29, 1937, not yet officially reported. In this latter opinion, referring to the opinion of the lower court in the instant case, the court said:

> "It appears to us that the conclusion reached by the court in the South Carolina decision is not in accord with the decisions of the Supreme Court of the United States insofar as it held the South Carolina statute invalid as to certain roads, and failed to give effect to the principle that the legislative authority had the right to use its judgment in determining what regulations were necessary or proper, as was held in the various opinions of the Supreme Court cited herein."

The decision in the South Carolina case, which is one of far-reaching importance to all the states is, we submit, contrary to the fundamental principles of the Constitution of the United States and to the repeated decisions of this court, all of which recognize the principle that the states may, by laws of uniform application, protect their own property and the safety and convenience of their own citizens, and that neither the Federal Government nor its courts can interfere with such laws unless they violate the Fourteenth Amendment of the Constitution. Of course where a violation of the Commerce Clause is claimed there may be the further question of discrimination, but that does not arise in the South Carolina case as the limitations apply alike to intrastate and interstate trucks.

II.

SUMMARY OF ARGUMENT.

POINT A.

Notwithstanding the trial court's findings of fact, the validity of the act should have been sustained for the following reasons, any one of which establishes the propriety of such a decision:

1. Regulations of the size and weight of trucks for the purpose of preserving the highways and protecting public safety and convenience, which are valid as to intrastate traffic, that is, which are not violative of the due process or equal protection clauses of the 14th Amendment, and which do not discriminate against interstate commerce, affect such commerce only incidentally and do not impose upon it an unreasonable burden.

The lower court held that the provisions of the South Carolina Act in question "are *not violative of the due process or equal protection clauses** of the 14th Amendment" (R. 84). The correctness of this conclusion is not questioned by appellees by cross-appeal or otherwise. The court found that the provisions of this Act discriminated against the interstate shippers of that state in the sense that their competitors in other states, where larger and heavier trucks are permitted to operate, receive more favorable treatment by the laws of those other states than was accorded to the shippers of South Carolina by the laws of that state.

*The italics throughout this brief are ours.

This, of course, is not discrimination, in so far as the statute of South Carolina is concerned, since it is uniform in its application. It therefore follows from the lower court's own conclusion as to the 14th Amendment and from the absence of discrimination that the Act should have been held to be valid.

2. There are approximately 60,000 miles of roads of all kinds in the state of South Carolina. The lower court held that the Act imposed an unreasonable burden upon interstate commerce, and was void, in its application to approximately 2,400 miles, but not so as to the remainder of the highway system. The statute was enacted in the interest of the highway system as a whole, and while the legislature did not indicate any division in its treatment of the roads as a whole, yet if it were conceded that 4% could bear the use of larger trucks than the ones permitted, this did not forbid the legislature, in order as a practical matter to secure the admittedly needed protection of the highways and the public safety, to include the small percentage of stronger roads. The lower court's theory demands that the legislature should fix different weights and sizes for different roads—impracticable in itself and a patent judicial dictation to the legislature.

3. The lower court found that even included within the 2,400 miles there were certain weak links, which could not support the heavier and larger trucks without damage. These links consisted of inadequate bridges, sections of low-grade highway and certain city streets in the same condition. The existence of these

admittedly weak links in the chain was of itself adequate reason to sustain the action of the legislature in making the law applicable to the 2,400 miles as well as to the remaining 57,600 miles.

4. The Court found that the vehicle ordinarily used by interstate motor transportation companies, with its customary pay load, has a gross weight of 30,000 pounds, and is 96 inches in width. Even if this custom or practice of commercial truck operators were somehow imposed on the legislature of South Carolina as its standard for determining what is proper for the protection of its highways and its citizens, nevertheless a variation of approximately 6 percent in width and 33⅓ percent in weight would still leave the present law within the bounds of legislative discretion, particularly in view of the recent great increase in traffic on the highways in question.

5. The facts within the Court's judicial knowledge and this Court's decisions establish the validity of the Act. All who travel the highways know that the large commercial trucks inconvenience and endanger the traveling public, for whom the roads are primarily built, and that the bigger and heavier the trucks, the greater is the nuisance and menace they cause. Likewise they cause greater damage to the roads with consequent increased maintenance costs. The argument that the destructive effect of the pounding wheels upon the highways and bridges does not increase with the weight of the vehicle is a sophistry that will not be accepted until the laws of gravitation and momen-

tum cease to exist. As to the law questions—the validity of state statutes having the same or substantially similar provisions, and applied under conditions substantially similar to those here in issue, has been so repeatedly sustained by this Court that the questions here involved have really been foreclosed.

POINT B.

It appears from the opinion of the lower court that the Federal Highway Act (U. S. Code, Anno., Tit. 23, Sec. 1, *et seq.*) and the Federal Motor Carrier Act of 1935 (U. S. Code, Anno. Sup., Tit. 49, Ch. 8), were erroneously assumed to restrict the power of the states to impose uniform limitations upon the size and weight of motor vehicles engaged in the commercial transportation of interstate commerce on federal-aid highways. The lower court, in effect, concluded that one of the purposes of Congress in enacting these two statutes and in giving aid in the construction of the highways was to open the Federal-aid highways to the kind of trucks which appellants desire to operate, and therefore concluded that the South Carolina Act conflicted with the Commerce Clause, and hence was invalid in its application to Federal-aid highways.

The Federal Highway Act does not impose restrictions upon, or in any way interfere with, the exercise of a state's police power by uniform regulations to conserve the highways and promote the safety of the traveling public. There is not a word in the Act to that effect.

As to the Federal Motor Carrier Act the lower court held, and from its judgment in this respect there was no cross-appeal, that that act did not supersede the state statute. That Act regulated the *business,* that is, the rates and practices of motor carriers engaged in interstate commerce and expressly left the subject of regulation of the weight and size of trucks for later consideration. In fact it directed the Interstate Commerce Commission to make a study of that subject and report its conclusion. No provision of that Act restricted the states in the exercise of their police power to enact uniform laws in the interest of public safety and convenience and for the protection of the public highways.

The lower court erroneously construed certain language of this court used in the opinions in *Morris* v. *Duby,* 274 U. S. 135, 145; *Buck* v. *Kuykendall,* 267 U. S. 307, 316; *Bush & Sons* v. *Maloy,* 267 U. S. 317, 324; *N. C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 417, to establish a rule contrary to the principles stated above.

III.

ARGUMENT.

POINT A.

Notwithstanding the Trial Court's Findings of Fact, the Validity of the Act Should Have Been Sustained.

The *effect* of the Motor Carrier Act of 1935 and of the Federal Highway Act and the contributions of the Federal Government thereunder in aiding in the construction of state highways will be considered under the second point of this brief. Accordingly, for the sake of the argument of this Point A we shall assume that those statutes have no effect and have no relevancy to the point now under discussion.

Before proceeding with that discussion it may be noted that the lower court in its *findings of fact* seemed to proceed on the assumption that its function was, first, to ascertain from the *weight of the evidence* whether or not the Act in question imposed a burden upon interstate commerce. In reaching the conclusion that the Act did impose such a burden the Court gave controlling weight to what would be profitable and convenient to those using the state's property in carrying on a transportation business for private gain. The Court then proceeded to set forth in its findings of fact all the facts and arguments which tended to support the primary conclusion. Although the very substantial amount of evidence as to the physical facts pertaining to the highways and bridges in controversy

and opinions of eminent highway engineers strongly and directly supported the reasonableness of the Act, the Court did not indicate that there was any conflict in the evidence—practically all of the evidence introduced by the appellants was simply ignored. In so doing we submit that the lower court misconceived its duty which was to make findings of fact, not in an ordinary case but in a case where the issue is as to the validity of the exercise of a state's police power in protecting its property and its citizens. We shall show that the Act did not discriminate against interstate commerce and that Congress has not restricted the police power of the states to preserve the highways and to protect public safety and convenience. Therefore, the issue of fact before the Court was whether or not the Act was so unreasonable and arbitrary as to be invalid. Since the subject manifestly lies within the police power of the state, the ultimate question of fact before the Court was whether the evidence introduced by the appellants and the facts within the Court's judicial knowledge made the question as to reasonableness a *debatable one. Sproles* v. *Binford,* 286 U. S. 374, 388. If so the legislature's judgment stands. Since the appellants' evidence at least created a sharp conflict with that introduced by appellees on the material issues of fact, this condition of the record should have been fairly portrayed in the findings of fact. The one-sided findings of fact made by the trial court are, however, merely an incidental application of the following more serious errors showing the court's fundamental misconception of the law of the case.

1. Since the Lower Court held the Act Valid Under the 14th Amendment and Since Discrimination, the Only Additional Feature Pertinent to the Commerce Clause, was Not Shown, the Court's Opinion on Its Face Shows that the Act Should have been Sustained.

It is said in the opinion of the lower court (R. 57), that the provisions limiting the gross weight of single trucks and tractor-semi-trailer trucks to 20,000 pounds, and limiting the width to 90 inches, are attacked on the grounds "that the provisions of the act in question are in violation of the 14th Amendment in that 'they constitute an unreasonable, arbitrary and capricious interference with the rights of plaintiffs to use the highways in a reasonable manner and for a lawful purpose.'" It may be also noted that in the body of the bill and in the prayer (R. 7, 18) it was alleged in support of the contention of a violation of the 14th Amendment that the weight provisions "have no real and substantial relation to the avowed objects and purposes of such Act as declared in Section 1 thereof, that is, to achieve economy in highway costs and to protect the safety and lives of the traveling public." This contention was rejected by the lower court, the fourth conclusion of law being as follows:

> "That the provisions of Act 259 of South Carolina of 1933 *are not violative of the due process or equal protection clauses of the 14th Amendment*" (R. 84).

In referring to its conclusion on this point the court, in its opinion (17 F. Supp. 803, 806), said:

> "This is sufficiently dealt with by the Supreme Court of South Carolina in the case of State, *ex rel.* Daniel v. John P. Nutt Co., 180 S. C. 19, 185 S. E. 25, cert. denied 297 U. S. 724, and there is no occasion to add anything to what is there said as to this aspect of the case" (R. 57).

This conclusion of the lower court related to the application of the law to the 2,417 miles of standard pavement as well as to the remainder of the highways of all kinds, that is, approximately 57,600 miles.

Assuming, as we do in this portion of the discussion, that the South Carolina Act is not rendered invalid by reason of the Federal Highway Act or the Motor Carrier Act of 1935, we submit that, since the Act was uniform in its application, that is, since it *did not discriminate* against trucks in interstate commerce but applied to all trucks alike, it follows from the lower court's conclusion quoted above that the Act was not invalid under the Commerce Clause of the Constitution. *Sproles* v. *Binford,* 286 U. S. 374, 388, 389; *Morris* v. *Duby,* 274 U. S. 135, 143; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 365, 366. In the case last cited the court, referring to regulations by the state of the use of its highways to promote public safety, said:

> "Regulations to that end are *valid as to intrastate traffic* and, where there is *no discrimination against the interstate commerce* which may be affected, *do not impose an unconstitutional burden upon that commerce.*"

It is true that in the 9th, 10th and 14th findings of fact (R. 79-80), and possibly in other findings, the court concluded that the enforcement of the Act would result in *discrimination* against South Carolina's textile mills, vegetable growers and manufacturers of furniture. However, it will be observed that the court used the word "discriminate" here in the sense that the competitors of the South Carolina shippers in other states were permitted by the laws of those states to operate larger and heavier trucks than were permitted by the laws of South Carolina. This, of course, is not the kind of discrimination which renders a state statute invalid under the commerce clause; in fact, it is not, properly speaking, discrimination at all. If a state statute is *uniform* in *its* application to local or intrastate commerce and to interstate commerce, there is no discrimination against interstate commerce, because of more favorable statutes of other states.

It will be recalled that in the analogous, and in many respects practically identical, case of *Sproles* v. *Binford, supra,* the court discussed the two questions here under consideration and after holding, first, that there was no violation of the *Fourteenth Amendment* (though the Texas weight limitation was 7,000 pounds per load, which is more exacting than the South Carolina statute), it took up the second question of interference with interstate commerce and, after showing that the Federal Highway Acts did not interfere with the power of the state to enforce the statute in question, in effect held that the only additional feature pertinent to the commerce clause was one of *discrimination.* It

decided that there was no discrimination, since the states could act "according to the special requirements of their local conditions;" and it disposed of any contention that it was discrimination for Texas to treat trucks in a manner different from their treatment by other states with this conclusive declaration:

> "As this principle maintains essential local authority to meet local needs, it follows that one State cannot establish standards which would derogate from the equal power of other States to make regulations of their own" (286 U. S. 390).

The lower court seemed to proceed upon the idea that the operator of a truck engaged in interstate commerce stands in some different and better position in attacking this law for unreasonableness than the operator engaged only in intrastate commerce. Except for the matter of discrimination (as to which there is none), the intrastate trucker would occupy the same position as the other in a suit based upon the denial of his alleged constitutional right to use the highways which are strong enough to bear his vehicle. The lower court, having specifically held that there is no violation of the Fourteenth Amendment, thereby disposed of the claims of plaintiffs (whether engaged in interstate or intrastate transportation, these being as to this question of equal status if not importance)—based upon the allegation that they were unconstitutionally deprived of the use of the highways which would carry their vehicles. The only difference between interstate

and intrastate commerce as here involved is that *discrimination* against interstate commerce would have rendered the act as to those so engaged invalid. But when there is no discrimination (as clearly appears from both the opinion and the statute), the multiplication of alleged inconveniences and losses suffered by the plaintiffs interested in interstate commerce does not give them a position any different from, or better than, the position of those engaged only in intrastate commerce.

2. Since the Lower Court Held that the Act Did Not Impose an Unreasonable Burden on Interstate Commerce in Its Application to 96% of the Highways, It was Error to Hold It Invalid in Its Application to the Remainder.

The lower court held that, with the exception of the 2,417 miles of standard pavement, "the said provisions of the Act cannot be condemned as an unreasonable burden upon interstate commerce when applied to the other roads and highways of the state" (Conclusions of law No. 2; R. 84). In other words, the court held that, as applied to approximately 96% of the highways of the State, the Act did not impose an unreasonable burden upon interstate commerce.

In its seventeenth finding of fact (R. 81) it is stated "that there are approximately 60,000 miles of roads of *all* kinds in the State of South Carolina." We think it is therefore fair to assume that the following statement taken from the opinion in *Sproles* v. *Binford*, 286 U. S. 374, at 385, may be properly applied to the highways of South Carolina:

> "There are all types of roads, 'ranging from dirt, gravel, shell, asphalt and bitulithic to concrete and brick highways' of varying degrees of strength."

Every state is confronted with the problem of preserving all of its highways and of protecting the safety of the public in its use of those highways. Many practical factors must be taken into consideration by the legislature in determining its policy as to the weight and size restrictions which it will impose upon motor vehicles. One possible problem (though we have never heard of it as a practical one) might conceivably be to decide whether those restrictions shall be made state-wide in their application, or whether it is practicable to divide the highways into various classes and make different restrictions applicable to the different classes. Theoretically, the latter might be wise and proper if all of the different classes of highways were uniform in thickness, width and condition, character of the subgrade, the vertical and horizontal curves and grades, the amount of the traffic, etc. However, the Court knows judicially that there is no *uniformity* as to any of these matters in any state, and the record shows there was no uniformity in South Carolina.

Moreover, there is the factor of *enforcement* which, as a practical matter, is one of great importance. Regardless of how perfect a law may be from a scientific standpoint, it is useless unless it is enforced. The difficulty of the enforcement of these restrictions is constantly brought to the attention of

the legislatures by the public press and by the reports of the officers charged with the duty of enforcing the law. It is a matter of common knowledge that even when these restrictions are uniform in their application on all the highways of the state, it is an exceedingly difficult matter to enforce them. It is a well known fact that the method generally adopted for the enforcement of these laws is to establish traffic officers and weighing stations or appliances at the crossings of the most heavily traveled highways, and that the roads of inferior type must largely depend for their protection upon the work done at those strategic points. If the heavy trucks were permitted to operate over a portion of the roads in any state, it would mean, as a practical matter, that they would use any roads they pleased.

Furthermore, the *type of the pavement* and *its condition* are subject to change as a result of factors over which the legislature has little or no control. Pavements are broken up and destroyed, sub-grades subside, bridges must be renewed and repaired. During the periodical reconstruction of the highways and the bridges, traffic must be detoured over other highways. Such other highways would, as a practical matter, be generally of an inferior type which would quickly be destroyed by the heavy traffic.

It is true, as the lower court said in its opinion: "A system of highways of 2,400 miles is a substantial system" (R. 67); but it is also true that these 2,400 miles comprise a relatively small portion, about 4%, of the entire highway system of the state. And, as

will be later shown, there are weak bridges and sections of inferior roads within this 2,400 miles. It must be obvious that the mere fact that there may be a substantial mileage in any state comprising a connected system which will sustain, without immediate injury, trucks of a certain size and weight does not obligate the legislature to vary its restrictions so as to permit its property to be used by such trucks.

The fact that the legislature, after considering all the facts pertinent to the exercise of its own legislative judgment, decided not to make any exceptions and classifications in the application of its law for the benefit of commercial carriers engaged in interstate commerce so as to permit them to use the state's property up to its maximum capacity, does not invalidate the law and does not impose upon the truck operators, or the business in which they are engaged, an unreasonable burden. The burden is merely incidental to the proper protection of the state's property as a whole.

In a broader and more correct sense there is no burden at all. The State permits commercial truck operators to use its property as a place for conducting their business. This privilege is a very valuable one. The fact that it is not greater and more valuable than the State deems wise to grant does not cause the benefit to become a burden.

The principle of permitting the legislatures to consider the application of a law as a whole and of declining to interfere because of a resulting hardship in particular instances has been recognized in a wide

variety of cases. It was recognized and applied by this court in this particular situation in the case of *Sproles* v. *Binford,* 286 U. S. 374, where the court sustained a Texas statute limiting the size and load of trucks against an attack upon the ground that it constituted an unreasonable burden upon interstate commerce. It said at page 385:

> "The statute was enacted in the interest of the whole State, and the State highway system in particular, and the operations of complainant and interveners constitute a very small portion of the traffic which the highways bear."

See, also, *New York* v. *Hesterberg,* 211 U. S. 31, 40; *Purity Extract and Tonic Co.* v. *Lynch,* 226 U. S. 192, 201; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388; *Nashville, etc., R. Co.* v. *White,* 278 U. S. 456, 459. The same principle has been recognized in a great number of cases sustaining the validity of classifications and exemptions. See, for example, *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370; *St. Louis & Iron Mtn. Ry.* v. *Arkansas,* 240 U. S. 518.

If the Legislature concluded—and evidently it did so conclude—that it was necessary to apply these weight and size restrictions to the 4% of the highways in order, as a practical matter, to secure the needed protection of the highways and the public safety on the 96%, "the inclusion of a reasonable margin to secure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388.

The case, however, is fully covered by the well established principle that granted the *power* of the legislative body, the *wisdom* or *propriety* or even *justice* of its act is not open to the courts. And in the case of a state's exercise of its police power to protect its own property and citizens, the right of the courts to interfere is still further restricted, the rule being that in such a case, if there is any basis for a difference of opinion as to the propriety of the statute, it comes within the scope of legislative discretion, and the judgment of the Legislature and not of the Court prevails.

The Court, in considering this identical question in connection with the Texas statute limiting the weight and size of trucks, thus stated the principle in *Sproles* v. *Binford, supra* (388):

> "When the subject lies within the police power of the State, *debatable questions as to reasonableness are not for the courts but for the legislature,* which is entitled to form its own judgment, and its action *within its range of discretion* cannot be set aside because compliance is *burdensome.*" (Citing authorities.)

Proceeding the court said (389):

> "*Applying this principle,* this Court in *Morris* v. *Duby,* 274 U. S. 135, sustained the regulation of the Highway Commission of Oregon, imposed under legislative authority, which reduced the combined maximum weight in the case of motor trucks from 22,000 pounds, which had been allowed under prior regulations, to 16,500 pounds."

Conceding, as the lower court did, that the South Carolina statute fixed a limitation that was proper and reasonable as to trucks traveling 96% of the roads, it seems almost ridiculous to hold that the Legislature was without constitutional power to apply the same limitation to the other 4%. In so holding the court, having found that this 4% is able to sustain trucks larger and heavier than the prescribed limitation, disregards all other considerations, such, for example, as added expense of constructing and maintaining the roads, the increased danger and inconvenience to the traveling public, the natural likelihood of the larger trucks, once in the state, using some of the other 96% of the roads, the difficulties thereby caused in policing the roads, the ill effects upon the numerous links connecting the different sections of 4%, etc.—considerations which the Legislature properly should, and doubtless did, have in mind when it prescribed a general limitation applicable to all the state roads.

3. In View of the Existence of Bridges, Sections of Highway and City Streets Which are Inadequate to Sustain the Larger and Heavier Trucks, the Court Should Not Have Substituted Its Judgment for that of the Legislature in Determining Whether the Law Should Apply to the Entire System.

At page 809 of its opinion (17 F. Supp. 803) the lower court said with respect to the 2,400 miles: "As there are a few bridges which were not built to support the heavy trucks of modern traffic, and a few which are too narrow, we think that the enforcement of the Act should not be held unreasonable as to such

bridges, provided they are properly marked with warning signs forbidding trucks of excessive weight or size to enter upon them." The court further said with respect to these bridges at page 815:

> "If there were a great many of these, their presence would justify the application of the Act to the entire system of highways, but the evidence shows that they are comparatively few in number; and interstate commerce, or at least a part of it, could be so routed as to avoid them entirely."

But to enforce the law it would be necessary to keep patrolmen, or other persons authorized to make arrests, stationed at these bridges day and night. We submit it was for the legislature and not the Court to determine whether adequate protection would be secured by posting notices and "routing" heavy traffic so as to avoid these bridges.

At page 809 of its opinion, again referring to the 2,400 miles, "there are short sections of such highways which have not as yet been constructed of standard paving," yet the Court held the Act invalid in its application to the entire 2,400 miles, not because these sub-standard sections could sustain the heavy traffic without injury, but because the Court did not think they were "of sufficient importance" (Finding 18, R. 81).

It is also apparent from the opinion of the court (17 F. Supp. 811) that there are streets in certain of the cities and towns on the so-called "standard pavement" as to which the application of the provisions of the law

was not unreasonable. However, the lower court, apparently acting on the assumption that the burden was upon the state to affirmatively establish the validity of the Act by the weight of the evidence, disregarded the proof as to these streets on the ground "there is no showing, however, that there has been substantial damage to any streets as a result of the heavy traffic which has been passing over them for the past five years." We submit that it was for the legislature and not for the Court to determine whether, in view of the inadequate bridges, sections of highways and city streets, the Act should be applied to the 2,400 miles as well as to the remainder of the highways. The lower court said:

> "It is unreasonable to withhold the entire system from the use of such traffic because of a few weak links, which, if injured by the traffic, can be repaired at comparatively slight expense."

We submit that this is a matter for the Legislature and not for the court to determine. Commercial motor carriers, which use the state's property at its sufferance, even though they are engaged in interstate commerce, have no right to impose *any* expense upon the state which the latter is unwilling to bear for their benefit, provided the law applies to interstate and intrastate transportation alike. Since the Federal Government itself may not take or destroy the property of the states, it may not, under its power to regulate commerce, authorize others to do so.

4. Assuming the Findings of Fact, However One-sided, to be Correct, Nevertheless the Provisions of the Act are Within the Limits of Legislative Discretion.

In the findings of fact (R. 83; No. 22) it is said "that gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but wheel or axle weight * * *." And in finding No. 17 it is said (R. 81):

> "All such pavement is capable of sustaining without injury * * * an axle load of 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires."

The court entirely loses sight of the fact that a *gross weight limitation* automatically results in an *axle weight limitation,* since the entire weight must be distributed upon the axles with which the truck is equiped. Theoretically, the distinction between low pressure and high pressure tires may be correct, but, as a practical matter, it is difficult, if not impossible, to apply in the enforcement of the law.

It is interesting in this connection to note that the Texas statute under attack in the case of *Sproles* v. *Binford,* 286 U. S. 374, provided for a *net load* rather than a *gross load* limitation; and it appears from page 388 of the opinion in that case that the truck operators, in order to have that Act declared invalid, contended "that damage from overweight can be prevented *only by regulations which fix a maximum gross load* and provide for its proper distribution through axles and

wheels to the highway surface." However, that effort "to make scientific precision a criterion of constitutional power" received the unqualified disapproval of this court.

If it be assumed, as it properly may (R. 135), that approximately 80% of the gross load of many trucks is carried upon the rear axle, and 20% upon the front axle, the practical application of the 20,000 pound gross weight limitation law is to impose a 16,000 pound axle limit. This, we submit, even though it may not have been in accordance with scientific principles, nevertheless came "within the broad range of legislative discretion."

It is said in the 20th finding of fact (R. 82):

> "The usual vehicle used by motor transportation companies in interstate commerce is a tractor-semi-trailer combination * * * carrying a pay load of 10 tons or 20,000 pounds,"

which, according to finding 16 (R. 81), makes "a gross load of about 30,000 pounds."

If the practice of motor carriers, when permitted to haul any load they please, can be said to be a factor which a state legislature must consider in enacting its laws, we submit that the action of the state of South Carolina in fixing the limit at 20,000 pounds instead of 30,000 pounds was within the limits of legislative discretion. It should be noted, however, that with the law annulled as to the 2,400 miles, there would be *no limit* upon the size and weight, and the "customary" 30,000 could, and doubtless would, be exceeded

at the will of the operating company, regardless of the damage to the roads.

The contention that the Act is invalid because it did not permit the operators of tractor-semi-trailer combinations to haul heavier gross loads than the operators of ordinary trucks is so obviously unsound that a statement of the proposition condemns it. The fact that appellees desire to operate the larger and more complicated combinations does not obligate the state to make classifications or to grant special privileges according to their wishes. The provision in question tends to reduce the size and weight and hence the danger, inconvenience and destructive effect of these combinations.

In its decree (R. 86) with respect to the width limitation of 90 inches, the court enjoined the enforcement of so much of the Act as fixed for trucks a maximum width of 90 inches "if the vehicle does not exceed 96 inches in width." In other words, it decreed that the maximum width limit should have been 96 inches and that the Act could be enforced if a vehicle exceeded 96 inches. Thus by a definite and deliberate species of legislation, more remarkable than any we have ever run across in the books, the court, not content with condemning and enjoining the width limitation fixed by the legislature, itself fixed a different and greater limitation, and declared that it would be unlawful to exceed that new limitation and that the law could be enforced if the offender used a truck wider than the limit thus fixed by the court. This is going far beyond

the situation in *Sproles* v. *Binford,* of which the court said that it was subjecting the state to an "intolerable supervision hostile to the basic principles of our Government."

That the court found *a* limitation to be necessary, and fixed it at not greater than 96 inches as against the legislature's judgment of 90 inches, itself shows that the difference of 6 inches could not possibly remove the subject from the rule as to the "broad range of legislative discretion" declared in *Sproles* v. *Binford.* It is true in South Carolina as it was in Texas, as found by the court in that case, that "on account of the width of traffic lanes, vehicles of greater width or length than that prescribed by the statute are hazardous for passing traffic, and the hazard will be materially reduced by a lighter load and a lesser width and length." *Sproles* v. *Binford,* 286 U. S. 374, 386.

It is also interesting to note in this connection that the primary basis for the finding that the width limitation of 96 inches is unreasonable is "the fact that all other states in the Union permit a width of 96 inches" (Find. No. 24, R. 83). This, in effect, permits other states to determine what restrictions South Carolina shall impose for the safety of its citizens. This is directly contrary to the principle announced by the Court in *Sproles* v. *Binford,* 286 U. S. 374, at 390 (quoted *supra*):

> "One state cannot establish standards which would derogate from the equal power of other states to make regulations of their own."

The lower court in its findings of fact and in its opinion repeatedly referred to *the great and constantly increasing amount of motor traffic upon the 2,400 miles of high-class highways* to justify the conclusion that the restrictions upon size and weight were unreasonable. It is submitted that evidence of such a condition is one strong justification for seeking to preserve those roads. This very point was emphasized by the court in the case of *Sproles* v. *Binford* (*supra*), where, after referring to the increase in recent years of truck registrations, the court said at page 385:

> "This *increase* in 'truck density' *justifies the dimensional and weight restrictions* of the statute in the interest of *public safety and convenience and highway protection.*"

In *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, the court said at page 373:

> "The legislature in making its classification *was entitled to consider frequency and character of use* and to adapt its regulations to the classes of operations, which by reason of their *habitual and constant use of the highways brought about the conditions making regulation imperative* and created the necessity for the imposition of a tax for maintenance and reconstruction. As the Court said in Alward v. Johnson, 282 U. S. 509, 513, 514: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough.' See, also, Bekins Van Lines v. Riley, 280 U. S. 80, 82; Carley & Hamilton v. Snook, 281 U. S. 66, 73."

This principle justified the legislature in applying to the more densely heavily traveled highways restrictions which may be below the maximum capacity of such highways.

5. The Facts of Common Knowledge and Within the Court's Judicial Cognizance and the Pertinent Declarations and Decisions of this Court Establish the Validity of the Act here in Question.

In *Aero Mayflower T. Co.* v. *Georgia Pub. Serv. Com.*, 295 U. S. 285, the court sustained the validity of a statute of the state of Georgia regulating private motor carriers for hire and imposing, among other conditions, an annual license fee. The validity of the Act was challenged under the Commerce Clause. At page 289 the court said:

> "Its validity in this aspect is attested by decisions so precisely applicable alike in facts and in principle as to apply a closure to debate."

This statement also applies to the South Carolina Act. The validity of that Act was attacked under both the 14th Amendment and the Commerce Clause in *Daniel* v. *John P. Nutt Co.*, 180 S. C. 19, 185 S. E. 25. After referring to the allegations of the petition, the South Carolina Appellate Court, at page 31, summarized the facts which the plaintiffs offered to prove, and it will be seen that these are substantially the same facts as were introduced in the instant case. At page 31 the court said:

"The Legislature, however, after due consideration of all the facts and circumstances, concluded that the act was necessary, first, 'to achieve economy in highway cost,' and, second, 'to permit the highways to be used freely and safely by the traveling public.' *That heavy vehicles increase the cost of construction and maintenance of highways is a fact of common knowledge.* For more than twenty years this state has graduated the license fees of motor vehicles according to their weight. *All know that the danger of a motor vehicle increases with its weight,* and that the width and length of the motor vehicles *bear direct relation to the safety of others using the highways.*"

And again on page 32 the court said:

"The court here *judicially knows that the facts exist, bringing the legislative power into play.*"

On page 29, after holding "the police power of the state concerning its highways has not been impaired by the Federal-aid statutes," it was said:

"It is recognized that the commerce clause of the Federal Constitution goes merely to the extent of inhibiting such regulations as result in *discrimination* against motor vehicles used in interstate commerce, and does not restrict the state in the exercise of its police power in this respect, *so long as the statute applies equally to all.*"

The doctrine of that case was virtually approved by this Court which denied certiorari 297 U. S. 724. The only substantial change in conditions which has

occurred between the time of the decision in the Nutt Case and the institution of this suit was the enactment of the Motor Carrier Act of 1935. We submit therefore that (excluding the simple legal question as to whether that Act superseded the state statute), the issues of both fact and law, elaborately discussed in the opinion of the lower court, have already been considered and determined by this court.

In *Sproles* v. *Binford, supra,* the court upheld, against an attack under the Commerce Clause, the validity of the Texas statute imposing restrictions on the size of trucks, the net load limitation there of 7,000 pounds being, in effect, a lower gross load limitation than that of the South Carolina Act. (See Note 6, page 389 of the opinion.) In discussing the question the court said (p. 388):

> "*Limitations of size and weight* are manifestly subjects *within the broad range of legislative discretion.* * * * When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature * * *."

In *Morris* v. *Duby,* 274 U. S. 135, the court sustained the action of the Highway Commission of Oregon in reducing the gross weight of motor trucks from 22,000 pounds to 16,500 pounds. In that case the court said at page 143:

> "In the absence of national legislation especially covering the subject of interstate commerce, the State may *rightly prescribe uniform*

> regulations adapted to promote *safety* upon its highways and the *conservation* of their use, *applicable alike to vehicles moving in interstate commerce and those of its own citizens.*"

Upon the general question as to the relationship between heavy trucks and the damage to highways and danger to the traveling public, that there is a definite relationship is not only a matter of common knowledge, of which the court will take judicial notice, but it has frequently been so declared by this court; and such of those authorities as involve interstate commerce hold that if the trucks are of size and weight which the state deems dangerous or destructive, they may be excluded provided only the law applies uniformly to vehicles engaged in intrastate and to those engaged in interstate commerce.

In the last case cited, *Morris* v. *Duby,* the court quoted with approval from its opinion in *Buck* v. *Kuykendall,* 267 U. S. 307, at 315:

> "To exclude unnecessary vehicles—particularly *the large ones commonly used by carriers for hire*—promotes *both safety and economy.* State regulation of that character is valid *even as applied to interstate commerce,* in the absence of legislation by Congress which deals specifically with the subject."

In *Bradley* v. *Pub. Util. Comm'n,* 289 U. S. 92, the court said at page 95:

> "The State may exclude from the public highways vehicles engaged exclusively *in interstate*

commerce, if of a size deemed dangerous to the public safety."

Again, in *Hicklin* v. *Coney,* 290 U. S. 169, at page 172:

> "Carrying capacity, *the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways."*

Also in *Hendrick* v. *Maryland,* 235 U. S. 610, page 622:

> "The movement of motor vehicles over the highways *is attended by constant and serious dangers to the public,* and is also abnormally *destructive to the ways themselves.* * * *
>
> "In the absence of national legislation covering the subject *a State may rightfully prescribe uniform regulations necessary for public safety and order* in respect to the operation upon its highways of all motor vehicles—*those moving in interstate commerce as well as others."*

So, too, in *Sprout* v. *South Bend,* 277 U. S. 163, page 169:

> "In the absence of federal legislation covering the subject, the State may impose, even upon vehicles *using the highways exclusively in interstate commerce, non-discriminatory regulations* for the purpose of insuring *the public safety and convenience."*

In *Carley & Hamilton* v. *Snook,* 281 U. S. 66, the court said at page 72:

"That the legislature may graduate the fees *according to the propensities of the vehicles to injure or to destroy the public highways,* and may exempt those with respect to which this tendency is slight or nonexistent, cannot be doubted. We may not assume that vehicles weighing less than 3,000 pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than 3,000 pounds with their accustomed burden added do not have this tendency. *It is for the legislature to draw the line between the two classes.*"

In *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 364, the court quoted with approval the following from the opinion of the Federal District Court:

"*The highways are being pounded to pieces by these great trucks* which, *combining weight with speed,* are making the problem of maintenance well-nigh insoluble. The Legislature but voiced the sentiment of the entire state in deciding that those who daily use the highways for commercial purposes should pay an additional tax. *Moreover, these powerful and speedy trucks are the menace of the highways.*"

And said at page 365:

"Motor vehicles may properly be treated as a special class, because their movement over the highways, as this Court has said, 'is *attended by constant and serious dangers to the public, and is also abnormally destructive to the highways themselves.*'"

According to the decision of the lower court the state is no longer "master in its own house" (Stephenson v. Binford, 287 U. S. 251, 276), but becomes the servant of destructive, and therefore unwelcome, guests.

In *Gilman* v. *Philadelphia,* 3 Wall. 713, 18 L. Ed. 96, sustaining the validity of the action of the City of Philadelphia in constructing a bridge over the Schuylkill River which would prevent the passage over that navigable stream of vessels having a mast, the court said at page 101:

> "It is for the municipal power to weigh the considerations which apply to the subject. * * * If a State exercise *unwisely* the power here in question, the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other State. * * * Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the State is *plenary,* and its exercise *in good faith cannot be made the subject of review by this court.*"

Notwithstanding these decisions, the effect of the lower court's opinion is to compel every state, which has declined to yield to the demands of the great interstate trucking companies, to make its choice between two alternatives, both of which are exceedingly burdensome and costly. Either it must amend its laws, in accordance with the demands of the large trucking companies, which are using the public roads as a place for carrying on their transportation business for profit,

or it must incur large expenditures and detach its legal, engineering and motor departments from their regular duties in order to prepare and conduct a far-flung lawsuit involving technical engineering problems and minute details with respect to the structure, condition and use of every mile of its highway system.

In view of the protection given by the decisions of this court, it seems fundamentally wrong for state after state (see citations, *infra,* p. 62) to be required to spend the time of its officials and the money of its taxpayers in the elaborate preparation for trial of issues of fact where the bill itself shows they are necessarily the same in principle and substantially the same in facts as those involved in the cases already decided.

POINT B.

It Appears from the Opinion of the Lower Court that the Federal Highway Act and the Federal Motor Carrier Act Were Erroneously Assumed to Restrict the Power of the States to Impose Uniform Limitations Upon the Size and Weight of Motor Vehicles Engaged in the Commercial Transportation of Interstate Commerce on Federal-aid Highways.

Even if we disregard for the moment what plainly appears from the opinion of the lower court to be the basis for its decision, it is obvious from the foregoing decisions and repeated declarations of this court that the lower court, in order to hold the South Carolina Act invalid, must have developed and applied to the facts in this case novel principles of constitutional law.

A careful analysis of the lower court's opinion, we think, makes clear that the Court would not have rendered the judgment from which this appeal is taken *but for the effect attributed to the Federal Highway Act and the Federal Motor Carrier Act.* It is true that the only reference to either of these acts in the findings of fact or conclusions of law is in the third conclusion of law, which is as follows:

> "3. That Congress has not assumed to control size and weight of vehicles by the Motor Carriers Act of 1935" (R. 84).

However, beginning near the middle of page 811 of the opinion in 17 F. Supp., and continuing on to the close of page 816—five pages—the court's discussion of legal principles is largely predicated upon the *effect* attributed to the two Federal acts, and its discussion of the evidence is made in the light of these conclusions as to the law of the case. For example, at page 811 it is said that the fact that the Federal Government has aided in the construction of the highways "is, we think, a circumstance which should be considered in passing upon the reasonableness of a state statute."

On page 813 it is said that the State act must not "defeat the useful purposes for which Congress made its *large contribution toward the building of the highways.*"

On page 814 it is said that the Federal Motor Carrier Act "is of significance because it makes clear the purposes of Congress *that said highways shall be open to commerce of that character.*" And, again, the fact

that "Congress is regulating" the business of motor carriers is apparently regarded by the Court as a matter "of *great importance.*"

It is also significant that the decree was limited to "*federal-aid highways*" (R. 81, 85).

Finally, it is demonstrated that the lower court held that the effect of the two federal statutes was to establish a new rule of law by the fact that, although the South Carolina statute is (1) *valid under the 14th Amendment* and (2) *does not discriminate* against interstate commerce, it was nevertheless held that that Act imposed an unreasonable burden upon such commerce.

Apparently the lower court considered the enactment of these federal statutes and the contributions made by the Federal Government under the Federal Highway Act as a material fact in determining whether the state law imposed an unreasonable burden upon interstate commerce, and also attributed to the federal statutes some effect as a matter of law *in circumscribing the powers of the state to enact laws to preserve the highways and protect public safety.*

The Court did not go so far as to hold that by the enactment of these federal statutes Congress had so *occupied the field* as to preclude state regulation—in fact it held to the contrary—but by considering the legal effect of these acts and their enactment as a matter of evidence a sort of halfway ground was reached with the apparent conclusion that the Federal Court was thereby authorized to substitute its judgment for that of the legislature in determining what

the weight and size restrictions should be. It seems, therefore, essential that we consider both of these acts and determine whether or not the court committed an error in attributing to them the effect above mentioned.

1. Neither the Federal Highway Act Nor the Fact that the Federal Government has Aided in the Construction of State Highways Restricts or Affects the Power of the State to Enact and Enforce the Legislation Here in Controversy.

We shall consider this act first, because it appears that the opinion of the lower court was largely based upon a misconstruction of certain language of this court in some of its decisions discussing the purposes and effect of this act.

The Act of Congress known as "The Federal Aid Act" (Act July 11, 1916, c. 241) was entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." This was amended by the Federal Highway Act of November 9, 1921, c. 119, U. S. Code Ann., Title 23, Sec. 1, *et seq.*, which was entitled "An Act to amend an act entitled 'An Act to provide that the United States shall aid,'" etc. Neither in the title nor in any provision of these acts, nor in any subsequent amendment thereto, is there any language which even faintly suggests that Congress intend to assert any authority to regulate the size and weight of the vehicles which might use the Federal-aid highways, or to restrict in anywise the power of the states to enact regulations for the preservation of the highways and the protection of the safety and convenience of travel

thereon. On the contrary, the Act itself contains a provision which affirmatively recognizes that by this act Congress asserted no such authority.

Section 19 is as follows:

> "The Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this chapter, including such *recommendations* to the Congress and the State highway departments as he may deem necessary for *preserving and protecting the highways and insuring the safety of traffic thereon.* (Nov. 9, 1921, c. 119, §18, 42 Stat. 216.)"

If Congress had intended to restrict the power of the states in enacting laws for preserving and protecting the highways and the traffic thereon, it would not have imposed the duty upon the Secretary of Agriculture *to make recommendations to state highway departments* to adopt regulations for these purposes. The main purpose of the statute as announced in its title was to *aid* the states, and not to *interfere* with them, in furnishing and maintaining highway facilities for the public. See in this connection *Townsend* v. *Yoemans,* 301 U. S. 441, 454. Notwithstanding the aid of the Federal Government in the construction of the highways, the *title* to the property and the *burden of maintaining* them remain with the states. Congress did not provide for any independent action along these lines by the Federal Government. The contributions of federal aid were conditioned upon contractual arrangements being made with the state which was to

receive the aid. There was no provision, express or implied, that as a condition precedent to the receipt of the federal aid a state should surrender any of its powers to protect its own property and to preserve the safety and convenience of the public.

It is unnecessary here to consider the serious constitutional question which would be raised if Congress had attempted, directly or indirectly, to interfere with this reserved power of the state to preserve its own property and protect its own citizens, nor is it necessary to rely upon the rule of construction to be applied in determining whether an act of Congress supersedes, suspends or limits the exercise of the police power of the states. But see in this connection *Reid* v. *Colorado,* 187 U. S. 137, 148; *Savage* v. *Jones,* 225 U. S. 501, 533; *New York N. H. & H. R. Co.* v. *New York,* 165 U. S. 628; *Missouri P. R. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612, 623.

In the case of *Morris* v. *Duby,* 274 U. S. 135, to which frequent reference has heretofore been made, it was contended that by reason of the Federal-aid Act of July 11, 1916, and the amendments thereto, the police power of the state *to restrict the gross weight of trucks* using the federal-aid roads to 16,500 pounds was in some way superseded or circumscribed, but the court said at page 143:

> "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary *police power to conserve the highways* in the interest of the public and to prescribe such reasonable

regulations for their use as may be wise *to prevent injury and damage to them.*"

However, the lower court has, we submit, construed certain language used by the court in the opinion in that case, and in two prior decisions, namely, *Buck* v. *Kuykendall*, 267 U. S. 307, and *Bush & Sons* v. *Maloy*, 267 U. S. 317, and in the latter case of *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, to mean that the Highway Act in some way restricts the state in the exercise of its police power—a construction which is not only not justified by *Morris* v. *Duby*, but is directly in the teeth of the court's discussion and decision in that case of questions almost identical with those of the case at bar.

To make this clear, a brief consideration of the above-mentioned cases is necessary.

The facts in the case of *Buck* v. *Kuykendall*, 267 U. S. 306, were as follows: An operator of an auto stage line in interstate commerce over a federal-aid highway was denied a certificate of public convenience and necessity by the authorities of the State of Washington on the ground that the territory was already adequately served by other carriers. This court held that the refusal of the certificate to applicant, after certificates had been granted to other operators, was a *regulation of the business of the carrier*, amounted to a determination of the persons by whom the highways might be used in interstate commerce, was a prohibition of competition, and *hence was a discrimination against interstate commerce*, and said at page 316:

"Such action is forbidden by the commerce clause." The court added the following:

> "It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways."

In other words, it in effect held that the Federal Highway Act merely made explicit the implied prohibition against discrimination contained in the Commerce Clause.

On the same day the opinion in *Bush & Sons* v. *Maloy,* 267 U. S. 317, was announced. In that case the facts were substantially the same as in the preceding case, except that the highways which the operator proposed to use were *not constructed or improved with federal aid.* The Court held that *this fact made no difference,* and that the effect of the commerce clause alone prevented a state from discriminating between interstate motor operators in the matter of granting certificates. Having reached this conclusion, the Court showed there was no distinction between Federal-aid highways and other state highways when it said with respect to the Federal-aid legislation at page 324:

> "The Federal-aid legislation is of significance, *not because of the aid given by the United States for the construction of particular highways,* but because those acts make clear the purpose of Congress that *state highways shall be opened to interstate commerce.*"

As will be later shown, the subsequent decisions of the Supreme Court have sharply confined the expression "shall be opened to interstate commerce" to the facts of the case in which it was used, namely, to situations where a *state action discriminated against interstate commerce.*

In 1927, two years after the decisions in *Bush & Sons* v. *Maloy* and *Buck* v. *Kuykendall,* the opinion in *Morris* v. *Duby,* 274 U. S. 135, was rendered. As has already been pointed out, in this case the court held that the Federal Highway Act neither expressly nor impliedly interfered with the power of the states to enact uniform regulations for the promotion of safety upon the highways and the conservation of their use, cited the case of *Buck* v. *Kuykendall* as authority for the proposition that "the state may not discriminate against interstate commerce," and held that, notwithstanding the Federal Highway Act, *"conserving limitation is something that must rest with the road supervising authorities of the state."*

In the later decision of *Stephenson* v. *Binford,* 287 U. S. 251, 266, it was expressly stated that the decisions in the Buck and Bush cases were based upon *discriminations relating to interstate commerce.*

In 1933 the opinion in *Bradley* v. *Public Utilities Commission,* 289 U. S. 92, was rendered. In that case the Public Utilities Commission of Ohio had denied a certificate of convenience and necessity to a motor carrier engaged in interstate commerce over a designated route on the ground that the route specified was already congested by motor traffic and that the appli-

cant's proposed service would endanger the safety of travellers and property upon the highways. The plaintiffs in that case relied upon the rule announced in *Buck* v. *Kuykendall* and *Bush & Sons* v. *Maloy*. But at page 95 the court distinguished those cases on the ground that those decisions rested upon the fact that *a discrimination in the regulation of the business of the interstate carriers* was there involved, and further said with respect to those cases:

> "The test employed was the *adequacy of existing transportation facilities;* and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to *promote safety; and the test employed was congestion of the highway.* The effect of the denial upon interstate commerce was *merely an incident.*
>
> "Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of *the police power.* It is primarily a *state function,* whether the *locus* be private property or the public highways. *Congress has not dealt with the subject*" (95).

In its effort to show that the Federal Act was intended to open the highways of the state to the kind of trucks that the plaintiffs in this case desire to operate regardless of what the state might deem necessary for the protection of its highways and the traveling public, the lower court relied heavily upon a single sentence at the end of the opinion in *Morris* v. *Duby,* which is as follows:

> "Regulation as to the method of use, therefore, necessarily remains with the State and can not be interferred with *unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems* of the Union and to facilitating the carrying of the mails over them" (145).

The lower court construed this to mean that the Federal Highway Act has the effect of invalidating a state statute provided the statute defeats any purpose which the Federal Government or any of its agencies had in mind in making contributions under the act. Carrying out this reasoning, the court then quoted at length from the opinion in *N. C. & St. L. Ry. Co.* v. *Walters,* 294 U. S. 405, 417, in order to show what were the purposes of Congress in enacting the Federal Highway Act and in making contributions thereunder. From the combination of its conclusions as to these two cases, the lower court then concluded, in effect, that one of the purposes of Congress was to open the Federal Aid Highways to the kind of trucks which appellees desired to operate. Accordingly it thereupon decided that the South Carolina Act conflicted with the commerce clause, and hence was invalid in its application to Federal Aid Highways.

To show that we are not over-emphasizing the importance which the lower court attached to the above quoted excerpt from *Morris* v. *Duby,* we call attention to the fact, as shown by the record (R. 98), that the lower court at the outset of the trial quoted that ex-

cerpt and announced that it was the rule under which the case would be tried, and directed that evidence be introduced accordingly. At page 813 of its opinion in 17 F. Supp. the court restated and amplified the portion of the excerpt shown in italics in the above quotation. We submit that the lower court's interpretation of the meaning of this court in the indicated portion of that excerpt is clearly wrong. While the lower court does not say it in so many words, it evidently interprets the above quotation as meaning that if a state regulation defeats the useful purposes of Congress in contributing to road building, that of itself constitutes the degree of unreasonableness that will render the Act void. There is nothing in the language of this court which justifies any such construction. On the contrary, the court definitely states that "regulation as to the method of use, therefore, necessarily remains with the state and cannot be interfered with unless"—then follows the condition when it can be interfered with, and that condition is not that the regulation will defeat the useful purposes mentioned, but that "the regulation is so arbitrary and unreasonable as to defeat," etc. In other words, this condition upon which the action of the state can be interfered with is still dependent upon a showing that the Act is "arbitrary and unreasonable," which is the language uniformly employed in describing an Act which violates the Fourteenth Amendment. Accordingly, there is nothing to support the lower court's implication that if a state regulation defeats the useful purposes of the federal Act it thereby

becomes *ipso facto* arbitrary and unreasonable and hence renders the state Act void.

That we are correctly construing *Morris* v. *Duby,* is proved by the two subsequent decisions, *Sproles* v. *Binford, supra,* and *Bradley* v. *Public Utilities Commission,* 289 U. S. 92.

Sproles v. *Binford* involved, as does the instant case, the validity of a state statute that sought to regulate the size and weight of trucks engaged in interstate as well as intrastate commerce. There the court first found that the Act did not violate the Fourteenth Amendment. It then proceeded to discuss the commerce clause and to interpret *Morris* v. *Duby,* reaffirming the holding that the Federal Highway Act left in the state its "ordinary police power" to preserve its roads and protect its citizens, and to do this by *uniform* regulations applicable to interstate and intrastate vehicles, as follows:

> "Second. The objection to the prescribed limitation as repugnant to the commerce clause is also without merit. The Court, in Morris v. Duby, *supra,* at p. 143, answered a similar objection to the limitation of weight by the following statement, which is applicable here: 'An examination of the acts of Congress discloses *no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them.* In the absence of national legislation especially covering the subject of interstate commerce, the

State may rightly prescribe *uniform regulations adapted to promote safety upon its highways and the conservation of their use,* applicable alike to vehicles moving *in interstate commerce and those of its own citizens.'* In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act" (pp. 389-390).

So, too, in *Bradley* v. *Public Utilities Commission, supra,* the court briefly reaffirmed the holding of the court in *Morris* v. *Duby* and *Sproles* v. *Binford* in the following conclusive declaration as to the power of a state to enact legislation of the sort here involved, saying:

"The State *may exclude* from the public highways vehicles engaged *exclusively in interstate commerce,* if of a size deemed *dangerous to the public safety,* Morris v. Duby, 274 U. S. 135, 144; Sproles v. Binford, 286 U. S. 374, 389-390."

In conclusion of this discussion of the meaning and effect of the last sentence of *Morris* v. *Duby,* we submit not only that there is no holding that the Federal Highway Act restricted the states' police power, but that the Court held just the contrary, when it said as shown *supra:*

"An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary *police power to conserve the highways* in the interest of the public and to prescribe such reasonable regulations for their use as may be wise *to prevent injury and damage to them.*"

Neither did the Court announce any change in the rules of law as to what constitutes arbitrariness and unreasonableness.

The opinion in *Nashville, etc.,* v. *Walters,* 294 U. S. 405, from which the lower court quoted at length (17 F. Supp. 803, 811-812) in order to ascertain the purposes of the Federal Highway Act and of the contributions thereunder, was decided in 1935. The facts in that case were as follows: A statute of the State of Tennessee authorized the State Highway Commission to require the elimination of a particular state highway and railroad grade crossing if, in its judgment, a separation of grades were necessary for the protection of persons traveling on the highway or railroad. Upon the issuance of such an order by the Commission the Act imposed upon the railroad company the obligation to pay one-half of the cost of the separation of the grades. The Commission issued the order and the railroad company attacked its validity by a suit under the due process clause of the 14th amendment, on the ground that "the main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles, * * *. The railroad has ceased to be the prime instrument of danger

and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation" (421). The Appellate Court of Tennessee sustained the order of the Commission without considering the evidence. When it came to this court the only question considered was whether the evidence and the special facts relied upon by the railroad were of such nature that they could not conceivably sustain the railroad company's contention. The Court did not pass upon the *validity* of the order of the Commission, it merely held that *the Supreme Court of the state should have considered the evidence and sent the case back for that purpose.*

It will be noted that there *no question of interference with interstate commerce was involved.* The court did not hold or indicate that the Federal Highway Act, as a matter of law, *restricted the power of the states to protect the public from the danger caused by the operation of railroads across highways.* It summarized the evidence and special facts tending to support the railroad company's contention that the great increase in motor transportation was the cause of the grade separation and that that industry would be the chief beneficiary. In this summary the Court referred to the Federal-aid legislation not as affecting the state's police p er, but as a special fact tending to support the above stated contention of the railroad company. It pointed out at page 417:

"The aim of that legislation is 'a connected system of roads for the whole Nation'; 'to provide

> complete and economical highway transport throughout the nation'; to furnish 'a new means of transportation, no less important to the country as a whole than that offered by the railroads.' "

In support of the statement of "aims," which the court showed by the use of quotation marks was taken from other sources, the court referred in a *note* to the *reports of the Chief of (Federal) Bureau of Public Roads.*

Another "aim" listed in this statement is "to establish 'lines of motor traffic in interstate commerce.' " The authority for this statement was a *message of President Harding to Congress.*

The opinion continues:

> "The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails."

In support of this statement the following appears in the Note to the opinion:

> "See Conference Report on 'Bill to provide that * * * the Secretary of Agriculture on behalf of the United States, shall in certain cases, aid the States in the construction, improvement, and maintenance of roads which may be used in the transportation of interstate commerce, military supplies or postal matter.' * * * Compare Co-ordination of Motor Transportation, 182 I. C. C. 263, 366."

Certainly the fact that one of the reasons for authorizing the Secretary of Agriculture to aid the states

was that Congress recognized that the roads "may be used in the transportation of interstate commerce" did not express *the intention to restrict the exercise of the police power of the states to protect those roads from destruction by interstate trucks.* It must be assumed that if Congress had an intention to assert a power which strikes at the heart of the reserved power of the states, it would express it in the Act itself and in language so clear and explicit that consideration of the grave constitutional issue thereby raised could not be avoided. The opinion continues:

> "The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed" (417).

The authority for this statement is "Reports of Chief of Bureau of Public Roads."

And, finally, it is said in the opinion:

> "To achieve its purposes, the Federal Government has made large contributions to the cost of the Federal-aid highway system."

Since there is nothing in the Federal Highway Act which even remotely suggests that the Act itself, or the state-aid contributions thereunder, would affect in any way the power of the states to regulate the size and weight of interstate trucks using these highways, the reports to which the court referred would not have been admissible if the statute were being construed for the purpose of ascertaining the effect of the federal

action in superseding state legislation or in circumscribing the exercise of the state police power. *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77.

However, if such reports were admissible upon that issue, their bearing would be too remote and indirect from the issues in the instant case to serve any purpose. But there is a report which relates directly to the question in this case. It is the report of the Joint Committee on Federal Aid in the Construction of Post Roads, House Document No. 99, 63rd Congress, 3rd Session. At page 22 of that report it was said:

> "It (Congress) should make careful provision for such administration for the Federal highway participation as will *protect the several states in their right to control their local highway affairs and guard against dictatorship from a Federal Bureau in Washington*" (pp. 22-23).

It is evident that the lower court in the instant case was of the opinion that by combining the excerpt quoted above from the opinion in *Morris* v. *Duby* with the indicated portion of the opinion in the *Walters* Case, there resulted some new rule of law that if the South Carolina statute interfered with the accomplishment of any of the aims, interests or incentives of the federal officials recited in the opinion in the *Walters* Case, the Act should be held to be invalid. Surely a state law may not be held to be invalid because, from the evidence, the court may conclude that the effect

of the law conflicts with the accomplishment of the aims or purposes of the Chief of the Federal Bureau of Federal Roads, or with the views of the Interstate Commerce Commission, or even the President of the United States. A conflicting aim or purpose of Congress of course would not invalidate a state act unless it was clearly expressed in an act of Congress.

But even if the "aims" of the Federal Highway Act were conceded to be those discussed above—and of course, without any declaration, the sensible purpose of the Act was to help the states construct better roads for ordinary purposes—that fact would not restrict the state's police power to regulate the weight and size of trucks using the roads in the absence of specific provisions to that effect. Furthermore, "the intent to supersede the exercise by the *State of its police power* as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted *is in actual conflict with the state law.*" *Townsend* v. *Yoemans,* 301 U. S. 441, 454. In this opinion, at page 455, it is also said that in "matters admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act." *Morris* v. *Duby,* 274 U. S. 135, 143, and *Sproles* v. *Binford,* 286 U. S. 374, 390, were cited as *two of the five leading decisions* in support of this proposition and thus, in effect, the Court again made clear what those opinions expressly decided, namely, that *the Federal Highway Act does not restrict or in any wise affect the power of the states to*

enact uniform laws limiting the size and weight of trucks.

If Congress had attempted such regulation of a state's roads—a question which of course does not arise in this case unless this Court should so construe the Federal Highway Act—we respectfully insist that such attempted regulation would be an unconstitutional invasion of the state's rights to determine what sort of roads and bridges it will construct and to prescribe non-discriminatory regulations for preserving them and protecting the traveling public in using them.

In the *Walters* case these aims, incentives and purposes of the various federal officials were material as special facts tending to show the extent of the use of the highways by motor carriers, because that was pertinent to the main issue in that case, whether it was reasonable to require a railroad company to pay one-half of the cost of a highway improvement when its competitors in business would be the chief beneficiaries.

However, in the instant case the great and increasing extent of the use of the highways by commercial motor carriers, instead of showing that the act now in issue was unreasonable, or otherwise invalid, strongly tends to support its validity. The lower court in its opinion did not attempt to analyze or give any independent consideration to the Federal Highway Act. If it had it could not have so thoroughly misconstrued and misapplied the opinions of this court dealing with that Act. It is our belief that this misapprehension of

these opinions is the explanation of the only decision which has come to our attention from any court, either state or federal, holding that, in the absence of discrimination against interstate commerce, a state motor vehicle regulatory law enacted for the preservation of the highways or the protection of public safety and convenience imposed an unreasonable burden upon interstate commerce.

2. By the Enactment of the Motor Carrier Act of 1935 Congress Did Not So Occupy the Field as to Prevent, Restrict, or in Anywise Affect the Exercise of the Power of the State to Enact and Enforce the Statute Regulating the Size and Weight of Motor Trucks.

The Motor Carrier Act of 1935 regulates the *business* of commercial motor carriers and, as the lower court demonstrated in its opinion, *does not regulate,* or authorize the Interstate Commerce Commission to regulate, *the weights and sizes of the motor vehicles* for the protection of the highways, or the public, or for any other purpose (17 F. Supp. 803, 806, *et seq.*). At page 808 the lower court said:

> "To sum up on this feature of the case, we do not think that there is anything in the language or in the history of the act which shows an intention on the part of Congress to regulate the size and weight of vehicles; and it is unreasonable to think that Congress would intend, by vague general language, to clothe the Commission with power to regulate a matter of such difficulty in which detailed regulations had already been prescribed by all of the 48 states, and thereby strike down all

state regulations affecting the matter and leave the subject unregulated until such time as the Commission might act. Our conclusion as to the proper interpretation of the act is supported by the following recent decisions; L. & L. Freight Lines, *et al.,* v. Railroad Commission of Florida D. C. Fla.), 17 F. Supp. 13, 14; Lowe v. Stoutamire, 123 Fla. 135, 166 So. 310; Railroad Comm. v. Southwestern Greyhound Lines (Tex. Civ. App.), 92 S. W. (2d) 296."

From this portion of the decree of the lower court no cross-appeal has been taken.

Since the decision in the instant case the same question has been decided in the same way in the following cases: *Werner Transp. Co.* v. *Hughes,* 19 F. Supp. 425, 432; *Werner Transp. Co.* v. *O'Brien,* District Court of the United States, Southern District of Iowa, Central Division, February, 1937 (Findings of fact and conclusions of law not officially reported); *Houston & North Texas Freight Lines* v. *Phares,* 19 F. Supp. 420.

But notwithstanding its holding that the Motor Carrier Act did not undertake to regulate the size and weight of trucks, the lower court clearly indicated that it did somehow as a law have an affect upon the power of the state, both as an expression of the purpose of Congress that the State highways shall be open and also as a preventive against the interference by the states with the subject "which Congress is regulating" (17 F. Supp. 803, 814).

A somewhat similar contention was made and held to be erroneous in *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249. There it was contended that two Arkansas statutes regulating the size of freight and switching crews were invalid because they were in conflict with the commerce clause of the constitution, and the due process and equal protection clauses of the Fourteenth Amendment, and were also repugnant to the Interstate Commerce Act and to the Railroad Labor Act. At page 256 the court said:

> "In the absence of a *clearly expressed purpose* so to do Congress will not be held to have intended to prevent *the exertion of the police power of the States* for the regulation of the number of men to be employed in such crews. Reid v. Colorado, 187 U. S. 137, 148. Savage v. Jones, 225 U. S. 501, 533. Napier v. Atlantic Coast Line, 272 U. S. 605, 611. Plaintiff, while not claiming the Interstate Commerce Act *in terms* purports to cover that subject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act and maintains that under them the Commission is empowered to regulate the 'practice' of carriers in respect of the 'supply of trains' to be provided by any carrier."

After showing that there was nothing in either the purpose of the Act or the meaning of the language used "to suggest that by it Congress intended to supersede state laws like those under consideration," the court continued on pages 257 and 258:

"The plaintiff further supports its contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is not similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

"No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that *it does not conflict* with the Arkansas statutes under consideration."

A similar contention was unsuccessfully made in *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, where an Act of Congress furnished a far stronger basis for the contention than does the Motor Carrier Act of 1935. There it was contended that since the Interstate Commerce Act had conferred upon the Interstate Commerce Commission authority to *eliminate discrimination* between shippers, it prevented action by the state to require that all shippers be treated alike in the matter of transfer and return of loaded and unloaded cars between the line of a connecting carrier and the flour mill and elevator of a particular shipper. At page 623 the court said:

"Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, *necessarily withdraws from the state all power in respect to regulation of a local character.* This proposition cannot be sustained."

In *Erie Railroad Co.* v. *Board of Public Utility Comrs.,* 254 U. S. 394, an order of the Public Utility Commissioners requiring the railroad company to bear the entire expense of the elimination of a number of grade crossings was sustained notwithstanding the grade crossing elimination would require an expenditure of over $2,000,000 by a company that did not have more than $100,000 available for this purpose. The fact that Congress, by the Interstate Commerce Act, was regulating the business of this carrier was given no weight as a matter of *law* in determining the rule by which the validity of the order should be determined, nor was it given any weight as a matter of *fact* in the application of the rule. The court said at page 411:

"To engage in interstate commerce the railroad must get on to the land; and, to get on to it, *must comply with the conditions imposed by the state for the safety of its citizens* * * * If the burdens imposed are so great that the road cannot be run at a profit, *it can stop, whatever the misfortunes the stopping may produce.*"

It should be remembered in this connection that these requirements which the Supreme Court sustained

applied to a railroad company which operated its trains over roadways not furnished by the state, but furnished and maintained by the company at its own cost.

See, also, *Vanddlia R. R. Co.* v. *Public Service Commission,* 242 U. S. 255; *Southern Ry. Co.* v. *King,* 217 U. S. 524; *Penna. R. R. Co.* v. *Hughes,* 191 U. S. 477; *Carey* v. *South Dakota,* 250 U. S. 118, 123; *N. W. Bell Tel. Co.* v. *Nebraska S. R. Comm.,* 297 U. S. 471; *Hartford Accident & Indemnity Co.* v. *Illinois,* 298 U. S. 155, 158; *Townsend* v. *Yoemans,* 301 U. S. 441.

A fortiori is the same principle equally relevant as applied to the supersize trucks. Since there was no prohibition of all trucks from a certain section of the country, the principle of the decision in *Hannibal & St. J. R. Co.* v. *Husen,* 95 U. S. 465, upon which the lower court relied, is inapplicable.

Whether or not the Motor Carrier Act of 1935 supersedes all state statutes regulating the *business* of interstate motor carriers we need not here consider; but it seems clear from reason and authority that the lower court erred in concluding that, because Congress is regulating the *business* of motor carriers engaged in interstate commerce (with no provision, express or implied, for the regulation of the size and weight of trucks) the authority of a state in the exercise of its police power to protect its highways and promote the safety and convenience of the traveling public is thereby more restricted than before the passage of the Federal Act. To summarize: In a case involving the validity of such state action, does a court have any greater right to substitute its judgment for that of the states

legislative body because of the enactment of the Federal Highway Act or the Motor Carrier Act, or both? If not, then the Court's extended discussion of the *effect* of these acts, apparently the main support of its decision, is irrelevant and of no effect.

Respectfully submitted,

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